rial disease suffered by the plaintiff for which the defendants did not know and could not reasonably have known. It is my opinion therefore that the plaintiff failed to show that the injuries sustained by him was due to the fault of the defendants. It is manifest from the medical evidence that the plaintiff suffered from the arterial disease, a natural disease which occurs gradually, and that any form of exertion may cause the thickening of the arteries and as a result of which a stroke could happen at any time even in his sleep.

In my judgment the plaintiff failed to prove that the injuries sustained were caused by the defendants' breach of statutory duty or their negligence. The claim is accordingly dismissed with costs.

Claim dismissed.

Solicitors: *Atma Singh Gill & Co.; Lovelace & Hastings.*

LAU SIENG NGUONG v. HAP SHING CO. LTD.

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) & MacIntyre F.J.) January 30, 1969]

[Kuching—Federal Court Civil Appeal No. X. 10 of 1968]

Contract — Contract evidenced by correspondence — Whole correspondence to be looked into.

The respondents claimed damages from the appellants for breach of a contract to supply 2,000 tons of *MLH* logs to them. To prove the existence of the contract the respondents relied on the correspondence between the parties which included:— (i) the appellant's offer to supply logs at $37 per ton; (ii) the respondents' acceptance of the offer, and that they required 2,000 tons of logs; (iii) the appellant's instructions that payment should be by letter of credit.

The appellant subsequently withdrew his offer to sell at $37 per ton, and made a new offer of $40 per ton which was refused by the respondents. The appellant in his defence, denied that there was a concluded contract between them. In an appeal from the judgment of the High Court awarding $6,000 damages to the respondents,

Held, dismissing the appeal: (1) where a contract is to be deduced from a set of documents it is necessary to look into the whole of the correspondence between the parties to see if the parties have come to a binding agreement;

(2) in this case the trial judge was right in holding that there was a binding contract between the parties.

Cases referred to:—

(1) *Hussey* v. *Horne Payne* (1879), 4 App. Cas. 311.

(2) *Bristol Cardiff & Swansea Aerated Bread Co.* v. *Maggs* (1890), 44 Ch.D. 616.

(3) *May* v. *Thomson* (1882), 20 Ch.D. 705, 723.

(4) *Lau Brothers & Co.* v. *China Pacific Navigation Co. Ltd.* [1965] 1 M.L.J. 1.

FEDERAL COURT.

Appellant in person.

C.T. Wong for the respondents.

Ismail Khan C.J. (Borneo): The respondents claimed damages from the appellant which it was alleged in the statement of claim arose from a breach by the appellant of a contract to supply 2,000 tons of *MLH* logs to them. In his defence the appellant denied that there was any concluded contract between them.

At the trial certain agreed documents were tendered and the court was invited to decide from these whether there was a contract between the parties. In the event the learned judge, having considered the documents, held that there was a contract, and gave judgment for the respondents in the agreed sum of $6,000. This is an appeal against the decision of the learned judge.

The action arose in the following circumstances: On the 9th of September 1965 the appellant received a telegram A.1 from the respondents requesting a quotation as to the price of *MLH* logs. The telegram reads:—

"1500/2000T VESSEL AVAILABLE LOADING FIRST HALF OCTOBER PLEASE QUOTE YOUR LOWEST FOB PRICE FOR MLH LOGS".

and the appellant's reply A.2 was as follows:—

"YC9 BEST MALAYAN 37 FOB CONFIRM".

On the 10th of September the respondents accepted the offer by telegram A.3 in these terms:—

"YC10 ACCEPTED 2000T *MLH* LOGS MUST GUARANTEE FRESH CUT GIRTH 36" UP LENGTH 12 UP WILL ADVISE SHIP ETA".

The appellant then sent the following telegram A.4:—

"YC11 PLEASE CABLE CREDIT IMMEDIATELY AND CABLE NAME STEAMER ETA REPLY".

On the 13th of September the respondents cabled as follows A.5:—

"YC12 CREDIT OPENING SANDAKANBAY ETA 15/20 OCTOBER".

The appellant followed up the last telegram with a letter in Chinese (Exh.A.15) dated 15th September 1965 the translation of which reads:—

"Sir,

I acknowledge receipt of your 2 telegrams for which I thank you for placing an order of 2,000 tons of mixed logs. You have also booked Sandakan Bay to come to take the delivery of logs by the middle of next month. I was very grateful to you for all the arrangements you have made. It was hoped that your company is satisfied with the goods supplied. As we have business to deal with each other as from this occasion it is hoped that we shall have more business association in future.

Your telegram clearly stated that a letter of credit was being despatched. I hope it will reach me in a few days. It was also my hope that no difficult conditions will be attached to the letter of credit so that I cannot carry out nor any necessary alterations on it etc. are required.

It was learnt that Sandakan Bay is able to load more than four thousand tons of logs. I should be grateful if you would please let me know who will come to load the remaining over two thousand tons of goods and whose agency the vessel belongs to."

The respondents then opened with the Overseas Trust Bank Limited, Hong Kong an irrevocable letter of credit in favour of the appellant. According to this letter of credit partial shipments were prohibited. It also required the appellant to furnish an additional document certifying that "the girth from 36" to 42" not more than 15% out of the total number of pieces and quality must be fresh cut, free from marine bore and worm damages." On the 18th of September the appellant wrote to the respondents A.16 translation whereof reads:—

"Sir,

I acknowledge receipt of your letter of 14th instant, together with a duplicate copy of letter of credit. The contents were fully noted. 2 points were raised in your letter. Honestly speaking, I felt it was difficult for me to comply with. Firstly, the girth limit 15% — 36" to 42". I can only do my best to send such size of goods as little quantity as possible but there was no guarantee. Secondly, if the letter of credit cannot be allowed to have been accepted as partial shipment it would be dangerous for me as it does concern the question of drawing money. The reason is that if the vessel could only be loaded with 1,500 tons of logs I should not be able to draw the money by then it would be too late for me to ask your company to make a certain alteration in the said letter of credit. In view of these two points, you please upon receipt of my letter make the immediate alterations as follows:—

(1) Delete clause of 15% girths limit 36" to 42".

(2) Allow partial shipments.

At the moment references relating to the local timber market prices are made from Hong Kong side and therefore the local prices have at least been stirred up. What the actual market prices in Hong Kong would be I did not know. I should be grateful if you would please let me know about it."

On the 23rd September the respondents cabled the appellant as follows A.6:—

"YL18 ITEM ONE AGREED REQUEST SELECT BIG GIRTH STOP SANDAKANBAY SHIPOWNER GUARANTEED SPACE 2,000 TONS CANNOT LESSEN REPLY."

To this the appellant replied A.7:—

"REGRET SUPPLIERS WITHDRAW OFFER BECAUSE CTC CLOSED AT 40 FOB OCTOBER NOVEMBER MOREOVER DISAGREE SHIPS GUARANTEE THEREFORE L/C MUST ALLOW PARTSHIPMENTS STOP CAN YOU ALLOW 40 FOB REPLY."

The respondents then replied as follows A.8:—

"YC24 NEW OFFER 40 UNACCEPTABLE STOP OURS 2000T SANDAKANBAY ETA 18/20 IF SPACE INSUFFICIENT WE RESPONSIBLE YOUR LOSS DON'T WORRY."

Further correspondence took place wherein the appellant indicated that he would supply the logs only at the price of $40 per ton. The respondents then requested the appellant to have the 2,000 tons ready for shipment by the ship "Sandakan Bay" which was to arrive on the 20th of October 1965, failing which they intimated that they would hold the appellant responsible.

It is clear law that where a contract is to be deduced from a set of documents it is necessary to look into the whole of the correspondence between the parties to see if the parties have come to a binding agreement (see *Hussey* v. *Horne Payne*,[1] *Bristol Cardiff and Swansea Aerated Bread Co.* v. *Maggs*,[2] *May* v. *Thomson* [3] and *Lau Brothers & Co.* v. *China Pacific Navigation Co. Ltd.*[4]). Ex.A.3 shows that the respondents had accepted the appellant's offer of $37 per ton and that they would require 2,000 tons of logs, fresh cut girth 36" up length 12' up. The appellant was prepared to supply the said logs as he indicated that payment was to be by letter of credit. He also wished to be informed of the name of the steamer. By his letter of the 18th September 1965 the appellant raised objections to 2 conditions in the letter of credit the first relating to 15% girth limit 36" to 42", the second relating to the prohibition of partial shipments. The respondents agreed to delete the first condition as it did not strictly conform to what was agreed.

With regard to the other condition the appellant took the point that as it stood in the event of the ship being unable to take the full tonnage of 2,000 tons, it could preclude him from getting payment for the tonnage actually shipped. The respondents insisted upon the retention of the condition against partial shipment. They said that until the appellant's letter of the 18th September the position was that the appellant had agreed to ship to them 2,000 tons by the "Sandakan Bay" and it was implicit that there should be only one shipment. The clause in the letter of credit prohibiting partial shipment made explicit what was once implicit. They had made it clear in their cable Ex.A.6 that they would guarantee space for 2,000 tons in the "Sandakan Bay". They were not prepared to accept a shipment short of 2,000 tons, and in Ex.A.8 they held themselves responsible for any loss by the appellant in the event of there being insufficient space for the full tonnage. This could only mean that they would pay the appellant the full price for the 2,000 tons. The appellant, however, withdrew his offer to sell at $37 per ton and made a new offer of $40 per ton. This was refused by the respondents.

I find that the trial judge was right in holding that there was a contract between the parties. The appellant had offered the price of $37 per ton. This was accepted by the respondents who had placed an order for 2,000 tons to be shipped by "Sandakan Bay" which was to arrive at Sibu by the 20th of October.

Until the letter of the 18th September the appellant had agreed to the price of $37 per ton and had agreed to ship 2,000 tons of logs by the "Sandakan Bay" by the 20th October. The condition in the letter of credit against partial shipment was as the respondents had submitted to "make explicit what was once implicit." It was not a new term of the contract. On the contrary to insist as the appellant did on a condition in the letter of credit allowing partial shipment would be to introduce something which had not been agreed to either expressly or by implication. The probable explanation for this manoeuvre on the part of the appellant would appear to lie in the increased price of logs at the time. It might have occurred to him that at $37 a ton he would incur a loss in the transaction. This is borne out by his cable Ex.A.7 giving the increase in the price as the main reason for his withdrawal of his offer, and again by his letter of the 2nd October, 1965 translation whereof Ex.17, he appeared to have dropped the pretence that there was any disagreement over the matter of the partial shipment. It would seem that had the respondents agreed to the increased price of $40 the appellant would have raised no difficulty.

The appeal is dismissed with costs here and in the court below.

Azmi L.P. and **MacIntyre F.J.** concurred.

Appeal dismissed.

ANG HUA BEE v. LEONG MIAW YU

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) & MacIntyre F.J.) January 30, 1969]

[Kuching—Federal Court Civil Appeal No. X. 12 of 1968]

Landlord and Tenant — Rent controlled premises — Recovery of possession — Receipt of subletting rent in excess of 75% — Party not precluded from relying on ground not raised in court below — Exercise of discretion — Control of Rent Ordinance (Sarawak, Cap. 86) s. 15(1)(a) & (j).

Practice and Procedure — Appeal — Point not taken in court below — Circumstances when not precluded.

The appellant brought an action for the recovery of rent controlled premises under paragraphs (a) and (j) of section 15(1) of the Control of Rent Ordinance. It was found that rent had been tendered before the expiration of 21 days after the date of notice of demand. The learned magistrate rejected the claim under section 15(1)(a). He held that he had a general discretion under section 15, and exercising the discretion he would not order possession under section 15(1)(j) as the appellant had come to court with unclean hands.

The appellant appealed to the High Court, but the issue of whether the learned magistrate had discretion was not raised. The High Court dismissed the appeal, and in an appeal to the Federal Court,

Held, dismissing the appeal: (1) as a general rule, a point not raised in the court below cannot be considered on appeal, but in cases relating to the jurisdiction of the court to order possession, the fact that a point was not taken in the court below does not preclude the tenant from relying on it;

(2) there is no jurisdiction for the exercise of discretion where possession is claimed under section 15(1)(j) of the Control of Rent Ordinance;

(3) in the absence of evidence of what the standard rent of the premises was, possession of premises under section 15(1)(j) could not be ordered.

Cases referred to:—

(1) *Davies* v. *Warwick* [1943] 1 All E.R. 309.

(2) *Selwyn* v. *Hamill* [1948] 1 All E.R. 70.

(3) *Jackson Development Ltd.* v. *Stemp* [1943] 2 All E.R. 601.

(4) *Tham Sai Mooi* v. *M.S. Thaver* [1954] M.L.J. 187.

(5) *T. Mohamed* v. *V.E.A. Mohaideen* F.M. Civil Appeal 20 of 1952, unreported.

(6) *Chen Chi Wei* v. *Khoh Keng Chong* [1951] M.L.J. 204.

FEDERAL COURT.

Appellant in person.

T.O. Thomas for the respondent.

Cur. Adv. Vult.

Ismail Khan C.J. (Borneo): This is an appeal against the decision of the High Court at Kuching affirming a judgment of the stipendiary magistrate at Kuching who dismissed the appellant's claim against the respondent for repossession of controlled premises No. 9 Courthouse Road, Kuching, hereinafter called the premises.

The appellant's claim was based on section 15(1)(a) and section 15(1)(j) of the Control of Rent Ordinance. Section 15(1) thereof is as follows:—

"No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases:—"

two whereof are section 15(1)(a) which reads:—

"Where at the date of notice determining the tenancy given by the landlord rent lawfully due was in arrears for twenty-one days or upwards after demand in writing and there was no tender thereof at or before such date."

and section 15(1)(j) which reads:—

"Where the tenant having sublet the premises or part thereof receives in respect of such subletting rents